

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

28403

FILE: B-213883**DATE:** May 30, 1984**MATTER OF:** Correction of Military Records - Claims
Settlements**DIGEST:**

When service members are restored to active duty by the Army Board for Correction of Military Records, backpay claim settlements are by statute to cover all periods of constructive active duty arising "as a result" of the correction. The period of constructive active duty from the date of the Board's determination to the date of actual restoration to duty arises directly from the correction action and, as such, should be included with other periods of constructive active duty covered by the claim settlement, with appropriate deduction of all interim civilian earnings. Hence, claim settlements are to be predicated on the date of actual restoration to duty rather than the earlier date of the Board's determination.

This matter involves Army members who are restored to active duty as the result of proceedings before the Army Board for Correction of Military Records. The issue presented is whether, in those cases, active duty backpay claim settlements under 10 U.S.C. § 1552(c) should be based on the date of the Board's determination or the later date on which the member actually returns to duty.¹ We conclude that settlement should be based on the date of the member's actual return to duty.

Background

On April 30, 1982, the Army Board for Correction of Military Records found that a Reserve first lieutenant had

¹ This action is in response to a request for a decision received from Colonel H. H. Gassie, FC, Director, Centralized Pay Operations, U.S. Army Finance and Accounting Center.

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been improperly separated from extended active duty several years earlier on August 27, 1976. The Board consequently determined that the officer's records should be corrected to expunge the separation, to reflect continuation on active duty after August 27, 1976, and to show a promotion to the grade of captain. The officer did not actually return to active duty until October 15, 1982, nearly 6 months after the Board's action on the case.

After the officer was restored to duty in October 1982, Army finance and accounting officials prepared a claim settlement certificate covering the constructive active duty period from August 28, 1976, through April 29, 1982, showing that for this period the officer's net backpay entitlement was \$41,374.76. Interim civilian earnings from non-Federal employment totalling \$64,789.97 were, however, determined to be deductible from that amount, so that the officer was found to be due nothing in the settlement.

The finance and accounting officials then prepared a voucher in the officer's favor in the net amount of \$11,149.52, representing active duty backpay and allowances for the period from April 30 through October 14, 1982, that is, for the 6-month period of constructive active duty following the Correction Board's action when the officer's actual return to active duty was pending. The voucher was certified and paid, but doubts have now arisen concerning the propriety of that payment.

Essentially, the concerned finance and accounting officials note that under the applicable statutes and regulations, when an Army member is retroactively and constructively restored to active duty status by the Correction Board, the member becomes entitled to active duty backpay and allowances, but interim civilian earnings are deductible in the settlement of the member's backpay claim. They further note that the statutes provide authority to continue the pay of a member whose backpay claim has been settled if the corrected record supports continued entitlement to that pay. In this case, they indicate, the \$11,149.52 payment in question was based on the premise that the officer's backpay claim accrued on the date of the Correction Board's action, with the officer having a separate entitlement to continued pay during the 6-month period of constructive active duty that elapsed after that date. They also note, however, that

the entire period of the officer's constructive active duty between August 1976 and October 1982 resulted directly from the records correction action. If the claim settlement had covered that entire period, they observe, the deduction of interim civilian earnings would have completely offset the officer's net military backpay entitlements, and the officer would not have been due any backpay at the time of actual restoration to duty. They ask whether claim settlements should cover the entire period of constructive active duty resulting from a correction of records in cases of this nature.

Applicable Statutes and Regulations

Subsection 1552(a) of title 10, United States Code, provides that the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Subsection 1552(c) further provides that the department concerned may pay--

" * * * a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his * * * service * * *."
(Emphasis added.)

The implementing Army regulations direct that, "Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement." 32 C.F.R. § 581.3(g).
(Emphasis added.)

In addition, subsection 1552(d) of title 10 provides that applicable current appropriations are available to continue the pay, allowances, emoluments, and other pecuniary benefits of any person who was paid under subsection (c), and who, because of the correction of his military record, is entitled to those benefits, but for not

longer than one year after the date when his record is corrected if he is not reenlisted in, or appointed or reappointed to, the grade to which those payments relate.

Claim Settlements under 10 U.S.C. § 1552(c)

1. Determination of net backpay due

We have consistently held that net military backpay credit in a claim settlement concluded under 10 U.S.C. § 1552(c) is to be based solely on the lawful benefits and liabilities resulting from the facts as shown by the corrected record. See, e.g., Major General Edwin A. Walker, 62 Comp. Gen. 406, 408 (1983); and 34 Comp. Gen. 7 (1954).

2. Deduction of interim civilian earnings

The deduction of interim civilian earnings from the net active duty backpay found due in a claim settlement is generally predicated on the concept that the concerned service member has a duty to mitigate the Government's obligations in the matter, and that the purpose of a correction of records is to restore the member--without awarding him an unearned windfall--to the same position he would have had if he had not been separated from military service.² Authority for the deduction of interim civilian earnings in administrative claim settlements is, however, based solely on the specific terms of the administrative directives and regulations which have been issued on the subject.³ Under the Army regulations, interim earnings are not recoupable in the full amount but are instead merely deductible from the net balance due, and this is consistent with the now well-settled principle that while service members are not to be allowed an unwarranted gratuity in a

² See 48 Comp. Gen. 580, 582 (1969); Motto v. United States, 175 Ct. Cl. 862, 865-869 (1966).

³ See Yee v. United States, 206 Ct. Cl. 388, 400-401 (1975); and Bates v. United States, 197 Ct. Cl. 35, 39-40 (1972). See also 48 Comp. Gen. 580, 583 (1969); and Reynoldo Garcia, B-207299, October 6, 1982.

claim settlement, they also are not to be restored to active duty with a net indebtedness to the Government, as a result of record correction proceedings.⁴

Continuing Payments Under 10 U.S.C. § 1552(d)

As indicated, this provision of the records correction statute authorizes the continuation of pay and benefits following a claim settlement for any person "who, because of the correction of his military record, is entitled to those benefits." The provision is derived from the act of October 25, 1951, Public Law 220, 82nd Congress, ch. 588, 65 Stat. 655, and is designed to furnish "future payments of a continuing nature" to persons "whose claims have been paid."⁵ A requirement was included in the provision that certain claimants be reappointed or reenlisted within a year of the record correction action primarily to cover "exceptional" cases in which continuing future payments of retired pay would be made to persons who would otherwise have no military status whatever, since it was concluded that those persons ought to acquire the status and responsibilities of retired military personnel who are, for example, subject to involuntary recall to active duty.⁶

Analysis and Conclusion

When the Army Board for Correction of Military Records determines that an individual was wrongly separated from active service, a certain amount of time is necessarily

⁴ See 57 Comp. Gen. 554, 560, 563-564; 56 Comp. Gen. 587, 591-592 (1977); and 49 Comp. Gen. 656, 662 (1970). See also Craft v. United States, 589 F.2d 1057, 1060, 1066-1068 (Ct. Cl., 1978).

⁵ See S. REP. NO. 788, 82d Cong., 1st Sess. 3 (1951); 97 CONG. REC. 7588 (1951); and Payment of Claims Arising from the Correction of Military or Naval Records: Hearings on H.R. 1181 Before Subcommittee No. 3 of the House Comm. on Armed Services, 82d Cong., 1st Sess. (1951).

⁶ 10 U.S.C. § 688. See H.R. REP. NO. 440, 82d Cong., 1st Sess. 3 (1951); and the records of the Congressional hearings referred to above (footnote 5).

required for that determination to be given effect. The record of the Board's proceedings must, for example, be reviewed by the Secretary of the Army, and the Board must then notify the individual of the action taken in the case. 32 C.F.R. § 581.3(f). In some cases the individual will need time to consider the options available, that is, whether to return to active duty or to enter retirement, etc. If the individual is eligible and elects to return to full-time Army service additional time will be required to arrange the actual return to active duty. The individual will be credited with the constructive performance of full-time active duty between the date of the Board's determination and the date of actual restoration to duty, but will in fact have been at liberty to engage in full-time civilian employment throughout that period.

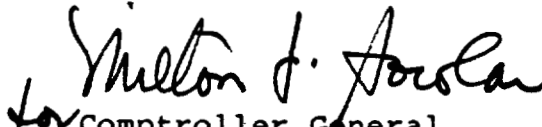
Further, in terms of subsection (d) itself the claimant never lost the status as a Reserve officer and under the Correction Board's action was never released from active duty. Thus, there is no need to involve the provisions of that subsection to permit continued payments to someone who lacks an appropriate military status.

Our view is that the period of constructive active duty following the date of the Correction Board's action arises directly "as a result of correcting a record" under the records correction statute and, as such, should be included with other periods of constructive active duty covered by the claim settlement concluded under 10 U.S.C. § 1552(c), with appropriate deduction of all interim earnings received from civilian employment. We find this conclusion consistent with the rule that when Army members are restored to active duty by Federal court order, deduction of interim civilian earnings from active duty backpay is predicated on the date of actual restoration to duty rather than the date of the court's action. See Captain Robert S. Colson, Jr., B-180371, October 2, 1974. We also find that when an Army member is actually restored to active duty as the result of action by the Correction Board, a claim settlement under 10 U.S.C. § 1552(c) predicated on the date of the Board's determination is artificial and unrealistic, and payment for constructive active duty subsequent to that date under 10 U.S.C. § 1552(d) is unwarranted since no future payments of a continuing nature are actually involved.

Hence, we conclude that when Army members are restored to active duty as the result of proceedings before the Army Board for Correction of Military Records, active duty backpay claim settlements under 10 U.S.C. § 1552(c) should be predicated on the date of the member's actual return to duty rather than the earlier date of the Board's determination.

In the specific case presented, therefore, we find that the claim settlement under 10 U.S.C. § 1552(c) should have covered the entire period of constructive active duty from April 1976 to October 1982, with the deduction of all interim civilian earnings received from the net active duty military backpay credit accrued during that period. Since, as indicated, those interim civilian earnings exceeded the officer's net military backpay entitlements, we further find that the officer was due nothing in the settlement, and that the \$11,149.52 payment in question was erroneous. The officer is in debt to the Government because of that erroneous payment and is liable to make restitution in the full amount. The officer is, however, eligible to apply for a waiver of the claim for collection under the provisions of 10 U.S.C. § 2774. That statute authorizes the Comptroller General to waive claims arising out of overpayments of military pay and allowances in certain circumstances if collection action would be "against equity and good conscience and not in the best interests of the United States," provided that there is no indication of fault on the part of the concerned service member.⁷

The question presented is answered accordingly.


for Comptroller General
of the United States

⁷ See 4 C.F.R. parts 91-93; Price v. United States, 224 Ct. Cl. 58 (1980); and 56 Comp. Gen. 943, 951-953 (1977).